

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Action No. 08-1275

In Regard to the Matter of:
Bayside State Prison
Litigation

BERNARD SHORT,

-vs-

WILLIAM H. FAUVER, et al,

Defendants.

* * * *

MONDAY JUNE 16, 2008

* * * *

BEFORE THE HONORABLE JOHN W. BISSELL, SPECIAL MASTER

MASTROIANNI & FORMAROLI, INC.
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Transcript of proceedings in the above
matter taken by Theresa O. Mastroianni, Certified
Court Reporter, license number 30X100085700, and
Notary Public of the State of New Jersey at the
United States District Court House, One Gerry Plaza,
Camden, New Jersey, 08102, commencing at 1:33 PM.

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1 JUDGE BISSELL: The first decision I'm
2 going to render this afternoon involves Bernard Short
3 whose case was tried this morning. The following
4 constitutes the Special Master's determination
5 regarding the complaint of Bernard Short, docket
6 number 08-1275.

7 This opinion/report is being issued
8 pursuant to the directives of the Order of Reference
9 to a Special Master and the Special Master's
10 Agreement and the guiding principles of law which
11 underlie this decision to be applied to the facts
12 upon which it is based as set forth in the jury
13 instructions in the Walker and Mejias jury charges to
14 the extent applicable to the allegations in Mr.
15 Short's case.

16 As finalized after review under Local
17 Civil Rule 52.1, the transcript of this oral opinion
18 will constitute the written report required by
19 paragraph seven of the Order of Reference to a
20 Special Master.

21 I'm basically prepared to accept the
22 testimony as presented by Mr. Short. There was
23 little to impeach it or contradict it. Mr. Short was
24 in Cottage 13 when the incident in question which he
25 described here, occurred, and I incorporate his

1 testimony by reference. Excessive force was indeed
2 applied to him under the circumstances.

3 He was sitting quietly and peacefully
4 in his chair reading a book with his head phones on
5 pursuant to permission from the housing officer. He
6 was told to assume the position when the SOGs arrived
7 which he did promptly. And nevertheless, despite
8 having done so and with no need for any sort of
9 either encouragement or reinforcement, the SOG
10 officer jumped on his back, rested his weight on his
11 knees at the base of Mr. Short's back and pressed
12 ahead with his arms on the night stick on the back of
13 his neck.

14 As I said, this certainly constitutes
15 excessive force under the circumstances and once
16 again incorporating by reference its definition in
17 the applicable jury instructions. Inexcusable,
18 unnecessary and completely unprovoked under the
19 circumstances. Accordingly, I find that Mr. Short
20 has, indeed, established the employment of excessive
21 force by the SOG officer upon him on the occasion in
22 question.

23 The next thing I address is the
24 question of the nature and award of any damages. And
25 I consulted with the jury instructions as amplified

1 in memoranda which are also available to me,
2 considering the question of deminimis injury and/or
3 nominal damages.

4 Despite possibly the temptation of
5 determining that this was a deminimis injury here, I
6 note from both the PLRA itself and otherwise that
7 that's a concept that's employed in connection with
8 whether or not mental or emotional suffering is to be
9 recovered. It's not essentially a concept that is
10 directed toward damages from physical injury.

11 For instance, the PLRA itself states at
12 42 USC section 1997e(c), and I quote, "no federal
13 civil action may be brought by a prisoner confined in
14 a jail, prison or other correctional facility for
15 mental or emotional injuries suffered while in
16 custody without a prior showing of physical injury."

17 And the third circuit and other courts
18 have addressed that question and have determined --
19 the third circuit's key opinion on this is Mitchell
20 versus Horn at 318F3rd-523, third circuit 2003-that a
21 reading of that statute requires less than
22 significant but more than deminimis physical injury
23 as a predicate to alleged emotional injury.

24 And once again, I believe in the Mejias
25 jury instruction, that principle is reiterated.

1 Accordingly, I have found that there
2 really is no grounds for assessing emotional damages
3 on behalf of Mr. Short at all. His testimony here
4 today was frank and candid. He certainly didn't gild
5 the lily. But basically in terms of either permanent
6 or temporary emotional or psychological injury, there
7 just isn't any established by the proofs.

8 So I then turned to the question of
9 nominal damages. I do not find that the injuries
10 which he sustained here, which were extremely
11 temporary and hardly debilitating even in a very
12 short run, have sustained any sort of a verdict for
13 significant compensatory damages. However, (and
14 although he really didn't sustain damages that are
15 measurable) he was the subject of this assault which
16 is, indeed, actionable.

17 Accordingly, I am making use of the
18 nominal damages instruction that appears in the
19 Walker instructions as follows, and I quote: "If you
20 find that the plaintiff has not sustained actual
21 damages, but you still concluded that his legal
22 rights were violated, then you may return a verdict
23 for the plaintiff in a nominal sum. Nominal damages
24 are awarded if you conclude that the plaintiff
25 suffered a deprivation of his rights, but did not

1 suffer any actual damages. Nominal damages may be
2 awarded only for a token sum of one dollar."

3 I find that Mr. Short has proven his
4 case on liability; however, he has failed to prove
5 any damages other than nominal damages and
6 accordingly recommend an award of nominal damages of
7 one dollar.

8 I note also, however, that the conduct
9 of the SOG officer in this case, although actionable
10 and one which supports this award of nominal damages,
11 was not so egregious as to support an award of
12 punitive damages under applicable legal standards.

13 And finally, although not every item of
14 evidence has been discussed in this opinion/report,
15 all of the evidence presented to the Special Master
16 was reviewed and considered.

17 To reiterate, I find that the injury
18 here is actionable, but that damages were unproven.
19 And accordingly, I recommend in this report that the
20 district court enter an award of nominal damages in
21 the amount of one dollar in Mr. Short's favor.

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C E R T I F I C A T E

I, Theresa O. Mastroianni, a Notary Public and
Certified Shorthand Reporter of the State of New
Jersey, do hereby certify that the foregoing is a
true and accurate transcript of the testimony as
taken stenographically by and before me at the time,
place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a
relative nor employee nor attorney nor counsel of any
of the parties to this action, and that I am neither
a relative nor employee of such attorney or counsel,
and that I am not financially interested in the
action.

Theresa O. Mastroianni

Theresa O. Mastroianni, C.S.R.

Notary Public, State of New Jersey

My Commission Expires May 5, 2010

Certificate No. XI0857

Date: June 17, 2008

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